Supreme Court, U. S.
FILED
NOV 17 1976
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1976

No. 76-691

DANIEL THOMPSON,

Petitioner,

vs.

EDWARD GAFFNEY AND
WILLIAM HULL,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO. _____

DANIEL THOMPSON
Petitioner-Appellant

-vs-

EDWARD GAFFNEY and
WILLIAM HULL
Respondents-Appellees

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of Certiorari issue to review the judgment of the U.S. Court of Appeals for the Sixth Circuit entered in the above-entitled case on August 13, 1976, which affirmed (by 2 to 1 vote) the denial of a writ of habeas corpus on May 6, 1975, by the U.S. District Court for the Northern District of Ohio, Eastern Division, which thereby affirmed petitioner's conviction under a Cleveland Heights disorderly conduct ordinance which, according to the District Court and the Court of Appeals, is unconstitutionally vague and over-broad on its face, in violation of the First and Fifth and Fourteenth Amendments.

OPINIONS BELOW

The order of the U.S. Court of Appeals for the Sixth Circuit denying the request by Petitioner for a rehearing, and the petition therefore are unreported and are reprinted herein as Appendices A and B. The opinion of the U.S. Court of Appeals for the Sixth Circuit affirming by 2 to 1 vote the denial of the petition for writ of habeas corpus is unreported and is reprinted herein as Appendix C. The opinion of the U.S. District Court for the Northern District of Ohio, Eastern Division denying the petition for writ of habeas corpus is unreported and is reprinted herein as Appendix D. The order of the Ohio Supreme Court dismissing sua sponte petitioner's appeal is unreported and is reprinted herein as Appendix E. The Opinion of the Ohio Court of Appeals for the Eighth Judicial District affirming petitioner's conviction is unreported and is reprinted herein as Appendix F. The statement of the Evidence, which is the only record of the proceedings in the Cleveland Heights Municipal Court other than what appears in the docket of that Court, is unreported and is reprinted herein as Appendix G. The Affidavit alleging the commission of a crime is reprinted herein as Appendix H.

JURISDICTION

The judgment of the Cleveland Heights Municipal Court was entered on February 25, 1972, convicting petitioner of speech which was wilfully directed at a police officer and was noisy, rude, insulting, boisterous or violent in violation of

Section 931.01(a) of the Codified Ordinances of the City of Cleveland Heights. The Court of Appeals for the Eighth Appellate District of Ohio, Cuyahoga County, affirmed the conviction on June 7, 1973 upon the reasoning that the ordinance as written and as applied, was not repugnant to the Constition of the United States. The Ohio Supreme Court dismissed an appeal sua sponte on the ground that no substantial constitutional question existed in the case, on October 12, 1973. A request for rehearing was denied by the Ohio Supreme Court on December 8, 1973. On December 11, 1973, Justice Potter Stewart issued a stay of execution pending the filing of a Petition for Writ of Certiorari with this Court. Said stay of execution was vacated on February 8, 1974, due to the Petition not being timely filed.

On February 12, 1974, a Petition for Writ of Habeas Corpus was filed on behalf of Petitioner in the U.S. District Court for the Northern District of Ohio on the grounds that he was being held pursuant to an ordinance which was unconstitutionally vague and overbroad, on its face and as applied to Petitioner's speech. The Petition was denied after a period of fourteen months during which time the Ohio Supreme Court decided the case of Cincinnati v. Karlan 39 Ohio St.2d 107, 314 N.E.2d 162 (1974). The District Court stated, after admitting that the Cleveland Heights ordinance in question was indeed unconstitutionally vague and overbroad on its face, that the ordinance had now been effectively limited by the Ohio Supreme Court's decision in Karlan which limited

a Cincinnati ordinance. The Court retroactively applied the vicarious construction, denying the Petition on May 6, 1975. On appeal, the Sixth Circuit found the ordinance to be constitutionally deficient, but affirmed, (2-1). It invoked the presumption of regularity to the trial Court's instructions, despite the fact that at the time of the trial of the case (1972), the ordinance had not been authoritatively construed to be applicable only to unprotected speech. Petitioner filed a Petition for Rehearing and a suggestion that an In Banc hearing was appropriate, but the Petition was denied on October 8. Appendix 1a.

The jurisdiction of this Court is invoked under 28 U.S.C. §§1254(1) and 2101, and part V of the Rules of this Court.

QUESTIONS PRESENTED

The constitutional question to be presented by this writ of Certiorari was presented to the Cleveland Heights Municipal Court by a motion to dismiss at the trial and was renewed and preserved at each appropriate stage of appellate review, except for the question relative to the presumption of regularity which first arose in the U.S. Court of Appeals for the Sixth Circuit as a partial basis for affirmance of the denial of the Petition for Writ of Habeas Corpus. The questions are as follows:

(1) Whether the limitation by the Ohio Supreme Court of a Cincinnati disorderly conduct ordinance, three years after the conviction of Petitioner under

an admittedly unconstitutionally vague and overbroad Cleveland Heights disorderly conduct ordinance, can serve to provide the authoritative construction necessary to cure the vagueness and overbreadth of the Cleveland Heights ordinance.

(2) Assuming arguendo that the vicarious limitation of the Cleveland Heights ordinance is valid, whether the retroactive application of the limited ordinance to Petitioner's speech, which was uttered three years prior to the limitation, is a violation of due process of law under the Fourteenth Amendment to the United States Constitution.

(3) Whether , on a silent record in a case affecting the fundamental First Amendment right of freedom of speech, the Court of Appeals erroneously applied the "presumption of regularity" in an attempt to satisfy the constitutional requirement that the trial court must have instructed the jury to find the Petitioner guilty only if his words amounted to "fighting words."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provision of the First, Fifth and Fourteenth Amendments to the Constitution of the United States, the pertinent parts of the habeas corpus statute, 28 U.S.C. §2243, § 901-04, Cincinnati Municipal Code and Section 931-01(a) of the Codified Ordinances of the City of Cleveland Heights are set forth in Appendix I herein.

STATEMENT OF THE CASE

Petitioner, Daniel Thompson, was arrested and received a citation for jay-walking by two Cleveland Heights police officers on July 24, 1971. Feeling that he was being harassed, Petitioner told his arresting officers that he did not believe in paying fines and that he might leave Ohio. The officers then attempted to place Petitioner in a patrol car for purposes of transporting him to the station to secure an appearance bond. At that point, Thompson called the officers "mother fucking pigs" for which he was charged with disorderly conduct under Section 931-01(a) of the Codified Ordinances of the City of Cleveland Heights. The charging affidavit signed by patrolman Morris read:

> "On or about the 24th day of July, at about 12:20 a.m. A.D. 1971, at the said City, County and State, one Daniel Thompson did unlawfully and willfully at or near 1815 Coventry Road, Cleveland Heights, Ohio, disturb the good order, peace and quiet of the City by conducting himself in a noisy, rude, insulting, boisterous, or violent manner toward other persons, contrary to Section 931.01(a) of the Codified Ordinances and against the peace and dignity of the City of Cleveland Heights, Ohio." Appendix H.

At the jury trial of the case, there was conflicting testimony as to the events, but there was no allegation of any "conduct"

other than the speech of the Petitioner. It was for this speech that the Petitioner was found guilty by the jury, after receiving no instructions as to the constitutional limitations which must be applied to ordinances which purport to regulate speech (Appendix G). The Court sentenced Petitioner to ninety days in jail, a fine of $250.00 and $180.00 in Court costs. No transcript of record of the trial proceedings was made due to local practice requiring a request for a Court Reporter, and payment of the costs therefor. Petitioner, being indigent at the time, could not afford the costs. Thus, a statement of the evidence was compiled by the pending trial judge and is attached hereto as Appendix G.

An appeal to the Ohio Court of Appeals for the Eighth Appellate District resulted in affirmance of the conviction on June 7, 1973 (Appendix F). In response to Petitioner's constitutional arguments, the Court held that the ordinance did apply to "fighting words" and since it deemed Petitioner's speech to fall within that category, the ordinance was properly invoked. It did not, however, construe the ordinance to apply only to constitutionally unprotected expression. Instead, it construed the statute in such a way that, for example, (1) rudeness, (2) by word, (3) directed at other persons, (4) that disturbs the peace and quiet of the City, can be punished under the ordinance (Appendix F at page 26a, Appendix D at page 17a).

The Ohio Supreme Court dismissed the appeal sua sponte on October 12, 1973,

and overruled a Motion for rehearing on November 8, 1973, because "no substantial constitutional question exists herein." (Appendix E.)

The Petition for Writ of Habeas Corpus was filed pursuant to 28 U.S.C. §§2241, 2242, 2243, and 2254, and the First, Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution, on February 12, 1974. Judge Lambros of the U.S. District Court for the Northern District of Ohio, Eastern Division found that jurisdiction existed to consider the Petition (Appendix D at Page 14a).

After an evidentiary hearing, at which the instructions to the jury were not considered due to an insufficient record in that regard, the Court took the matter under advisement for over fourteen months. After the decision in Cincinnati v. Karlan, 39 Ohio St.2d 107, 314 N.E.2d 162 (1974) certiorari denied, 419 U.S. 1056, 95 S.Ct.640, 42 L.Ed.2d 654 (1974), the District Court held that through that case which construed a Cincinnati Ordinance (attached hereto as Appendix I at page 36a), to be applicable only to "fighting words" (see Appendix J at page 37a), the Cleveland Heights ordinance which the Court determined was unconstitutionally vague and overbroad on its face and as construed by the Ohio Court of Appeals is also so limited. The Court then retroactively applied the vicarious warning construction to Petitioner's speech of three years earlier, and denied the writ on May 6, 1975. (Appendix D at page 21a .)

On appeal to the U.S. Court of Appeals for the Sixth Circuit, Petitioner argued that the narrowing of the Cincinnati Ordinance could not cure the unconstitutional vagueness and overbreadth of the ordinance under which Petitioner was charged, that the retroactive application of the "narrowed" Cleveland Heights ordinance to Petitioner was a violation of due process of law and the ex post facto provisions of Article I, Section 10 of the U.S. Constitution, and that the District Court erred in assuming that Petitioner's words were in fact within the "fighting words" category when no such factual finding was made at trial.

In response to these arguments, the Court of Appeals found that indeed the ordinance was unconstitutionally vague and overbroad on its face, but that the Ohio Supreme Court's opinion in Karlan, supra, cured and did provide the authoritative construction necessary to cure the constitutional infirmities of the Cleveland Heights ordinance. In response to the factual finding that Petitioner's words were "fighting words," the Court said:

> "If we had before us a transcript demonstrating that the jury was not [properly] instructed, we would hold that the writ should have been granted because of the possibility that the jury convicted Thompson for protected speech . . . . However, in the absence of a transcript of the Court's instruction to the jury, and according to the state

proceedings the presumption of regularity to which they are entitled, we have no alternative but to hold that Thompson has failed in carrying his burden of proving that the jury was not properly instructed . . ." Appendix C at page 9a.

However, the dissenting opinion written by Judge McCree states:

"I do not think the 'presumption of regularity' can be stretched far enough to support the majority's holding that the Municipal Court Judge gave an instruction at petitioner's trial in 1972 that was limited to fighting words as required by the Constitution. I find it impossible to presume that the Municipal Judge anticipated by almost three years the construction given in 1974 to a similar ordinance by the state supreme court, which in 1973 had dismissed petitioner's appeal sua sponte because 'no substantial constitutional question exists herein.'" Id. at page 10a.

Judge McCree would have remanded the case to the District Court for an evidentiary hearing on what instruction was given, placing the burden on the City to show that the proper instruction was in fact given Ibid.

REASONS FOR GRANTING WRIT

This case involves important yet heretofore unsettled questions

relating to the proper role of the federal judiciary in state proceedings which restrict the fundamental First Amendment right to speak freely, without moderation, and even foolishly, when confronted with what appears to the speaker to be unjustified police intimidation and harassment.

The first of these questions relates specifically to the power of a federal district court to reach beyond the state Court interpretation of the specific ordinance before it, and apply what it believes would be the present position of the state high court on the ordinance, even though that state high court had twice refused to give the ordinance the interpretation that the district court would now ascribe to it.

Second, based on this new interpretation, the extent to which the District Court may retroactively apply the ordinance which it has newly created and not offend the principles of fair warning embodied in the due process clause of the Fifth and Fourteenth Amendments, is a questions which has not been squarely faced by this Court, but which has obvious farreaching ramifications.

The third important federal question present in this Petition is the extent to which, in a case affecting vital and fundamental constitutional rights, a reviewing court may rely on a presumption of

regularity in favor of the trial Court proceedings, in order to find that the trial court gave a sufficiently narrow instruction, when all the circumstances of the case would tend to show that there is no reason to believe such an instruction was given. This is essentially a burden-of-proof question, but once placed in the context of the state's responsibility not to infringe important and fundamental rights of citizens. Whether in a case with a silent record, the person accused of criminal speech should be made to bear the burden of proof when there is no reason to believe that the trial court acted pursuant to its constitutional duty, is a question not before addressed by this Court.

I.

WHETHER THE LIMITATION BY THE OHIO SUPREME COURT OF A CINCINNATI DISORDERLY CONDUCT ORDINANCE, THREE YEARS AFTER THE CONVICTION OF PETITIONER UNDER AN ADMITTEDLY UNCONSTITUTIONALLY VAGUE AND OVERBROAD CLEVELAND HEIGHTS ORDINANCE CAN SERVE TO PROVIDE THE AUTHORITATIVE CONSTRUCTION NECESSARY TO CURE THE VAGUENESS AND OVERBREADTH OF THE CLEVELAND HEIGHTS ORDINANCE.

Petitioner was convicted under Section 931.01 (a) of the Codified Ordinances of the City of Cleveland Heights for uttering profanity to two Cleveland Heights police officers. The ordinance reads as follows:

> "It shall be unlawful for any person to wilfully conduct himself in a noisy, rude, insulting, boisterous, or violent manner toward any person or persons, by either word or act, which disturbs the good order, peace, and quiet of the City or any portion of its inhabitants."

Although this ordinance may be directed at either conduct or speech, there is no indication in the Statement of the Evidence (Appendix G) which is the only record of the trial proceedings, that Petitioner was convicted for anything other than his speech.

As such, the ordinance must receive strict scrutiny when challenged as to the constitutionality of the application to what may be protected expression. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Gooding v. Wilson, 405 U.S. 518 (1972); Rose v. Locke, 96 S.Ct. 243 (1975), Smith v. Goguen, 415 U.S. 560 (1974).

Both the U.S. District Court and the Court of Appeals for the Sixth Circuit, who have considered this ordinance, have concluded that on its face and as construed by the Ohio Court of Appeals, the ordinance cannot meet constitutional muster because of its susceptibility of application to protected expression. (Appendix C at page 3; Appendix D at page 16a). Thus, because of its facial overbreadth, the ordinance cannot be applied until

authoritatively construed by the state courts to apply only to forms of unprotected expression. Gooding v. Wilson, supra, Lewis v. New Orleans, 415 U.S. 130 (1974); Plummer v. Columbus, 414 U.S. 2 (1973).

The construction limiting the ordinance to "fighting words" must come from the state courts since the federal courts lack jurisdiction to authoritatively construe state legislation. U.S. v. Twenty-Seven Photographs, 402 U.S. 363 (1971).

Despite the above, the U.S. District Court and the Court of Appeals have, through their own decisions, attempted to construe the ordinance in question as they believe the Ohio Courts would. (Appendix C at page 4 ; Appendix D at page 20a). This is based on the decision of the Ohio Supreme Court in Cincinnati v. Karlan, 30 Ohio St.2d 107, 314, N.E. 2d 162 (1974) cert denied 419 U.S. 1056, 95 S.Ct. 640, 42 L.Ed 2d 654 (1974) wherein the court, following a remand from this Court, reluctantly applied the limiting construction required by Chaplinsky, supra and Gooding, supra to a Cincinnati disorderly conduct ordinance. (see Appendix J for the text of the Karlan decision). However, that decision by its own terms does not purport to have such a broad sweep as to encompass all "similar" disorderly conduct ordinances in the state of Ohio, but rather that decision is carefully limited to its facts, and the ordinance directly involved.

Appendix J at page 41a .

When this is coupled with the reluctance expressed both in the Karlan case and in this case (the Ohio Supreme Court saw no substantial constitutional question involved in the Cleveland Heights Ordinance, see Appendix E), by the Ohio courts to adhere to the requirements of the Court's opinions in Gooding supra and its progeny , it is unrealistic to assume that the Ohio courts would simply follow the law and construe the ordinance in question as required. In that case, it would seem improper for the District Court to take that step in lieu of the Ohio Supreme Court, especially since it lacks jurisdiction to do so authoritatively.

In the words of Mr. Justice Douglas in his dissent to the granting of certiorari in Karlan v. Cincinnati, 416 U.S. 924, 94 S.Ct. 1922, 40 L.Ed. 2d 280 (1974),

> "The duty of the States in this area has long been clear. After Chaplinsky, federal intervention in Terminiello should have been unnecessary. After Chaplinsky and Terminiello, Gooding should have been unnecessary. Yet after them all, the State Supreme Court in Lewis, on reconsideration in light of Gooding, again failed to narrow the ordinance and affirmed a conviction which we found necessary to reverse. The principle in Lewis was not new; it was not new in Gooding, nor in Terminiello, nor even in Chaplinsky. State Courts, however

have consistently shown either inability or unwillingness to apply its teaching." 416 U.S.at 928, 40 L.Ed.2d at 281.

Thus, to say that the Ohio Supreme Court would now apply the authoritative construction required under the law, and base an affirmance of a conviction under an ordinance which is undisputedly constitutionally deficient (Respondent does not dispute that the ordinance is unconstitutional on its face, see Appendix C at page 3) on that proposition, is to ignore the express action taken by the Ohio Courts.

The federal courts are bound by the construction placed upon a state act by the state courts and may not substitute their judgment for that of the courts of the state. The federal courts may only see that the interpretations of the state act conform to federal requirements. Wainwright v. Stone, 414 U.S. 21, 22 (1973); O'Brian v. Skinner, 414 U.S. 524, 531 (1974); Chaplinsky v. New Hampshire, supra.

Therefore, it was error for the District Court and the Court of Appeals to adopt a construction reluctantly applied to a different ordinance in a different case by the Ohio Supreme Court to this ordinance in this case, and thereby affirm Petitioner's conviction. Each ordinance must be considered in its own right. Chaplinsky supra; Gooding supra; Lewis, supra. Since this ordinance has not been authoritatively construed by the Ohio courts to be applicable only to unprotected expression, it remains unconstitutionally overbroad and vague, and Petitioner's conviction thereunder must be reversed. Gooding supra; Lewis supra;

Plummer supra.

II.

ASSUMING ARGUENDO THAT THE VICARIOUS LIMITATION OF THE CLEVELAND HEIGHTS ORDINANCE IS VALID, WHETHER RETROACTIVE APPLICATION OF THE LIMITED ORDINANCE TO PETITIONER'S SPEECH, WHICH WAS UTTERED THREE YEARS PRIOR TO THE LIMITATION, IS A VIOLATION OF DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

The District Court applied the ordinance which it deemed sufficiently limited by Karlan, supra, to Petitioner's speech which was uttered three years prior to the Karlan decision (Appendix D at page 20a). In so doing, it retroactively applied said construction since at the time of the trial, the construction had not yet been applied. Thus, at the time of the trial, Petitioner had no notice of the ordinance as it would eventually be interpreted. This is a violation of due process of law. Pierce v. U.S., 314 U.S. 306 (1941).

Since the ordinance on its face was unconstitutional because it was not limited to unprotected expression, it was as if it had never been enacted. Chicago, Indianapolis & Louisville Ry. Co. v. Hackett, 228 U.S. 559, 566 (1913); Norton v. Shelby County, 118 U.S. 425, 426 (1886) The fact that it later gained life through the narrowing construction placed on it by the District Court in this case, does not change matters since the ordinance must be viewed as it existed at the time

of the offense and trial, and when the action was first filed in the District Court. Stromberg v. California, 281 U.S. 359 (1931); Terminiello v. City of Chicago, 337 U.S. 1, 5-6 (1949); Ashton v. Kentucky, 384 U.S. 195, 198 (1966). Thus, the propriety of Petitioner's conviction must be determined as of that time. Any other analysis would subject Petitioner to punishment pursuant to a different ordinance than that under which he was arrested and tried. This would deprive him of due process of law because of his lack of notice of the nature of the charge against him. Bouie v. City of Columbia, 378 U.S. 347 (1964); Love v. Fitzbarris, 311 F. Supp. 702 (N.D.Cal. 1970), aff'd 460 F.2d 382 (9th Cir. 1972) vacated and remanded on other grounds, 409 U.S. 1100 (1973); Connally v. General Construction Co., 269 U.S. 385 (1926); Rabe v. Washington, 405 U.S. 313 (1972); Cole v. Arkansas, 333 U.S. 196 (1948).

The fact that Petitioner may have had some notice that the speech he was about to utter was offensive should not be sufficient to supply the type of specific notice of criminal activity which is contemplated by the due process clause, so as to allow a retroactive application to affirm the conviction. This is because the First Amendment protects outlandish remarks as vigilantly as sophisticated or scholarly discourse. Baumgartner v. U.S., 322 U.S. 665 (1944); Cohen v. California, 403 U.S. 15 (1971). The details of the offense are irrelevant to a consideration of the constitutionality of Petitioner's conviction, since despite the nature of his speech, he is entitled to raise the

defects in the ordinance. If the ordinance is unconstitutional, his conviction must fall. Gooding, supra; Lewis, supra; Plummer, supra; Coates v. Cincinnati, 402 U.S. 611 (1971).

The effect of affirming Petitioner's conviction through a retroactive application of a new construction, is to charge him with a new offense i.e. that of uttering "fighting words" (See charging Affidavit, Appendix H) and to convict him without formal proceedings and without providing him with the opportunity of refuting the allegation that his words were in fact "fighting words." Under the above-cited decision of this Court, such an application as was done by the District Court in this case and affirmed on appeal, is repugnant to the due process clause of the Fifth and Fourteenth Amendments.

III.

WHETHER ON A SILENT RECORD IN A CASE AFFECTING THE FUNDAMENTAL RIGHT OF FREE SPEECH, THE COURT OF APPEALS ERRONEOUSLY APPLIED THE "PRESUMPTION OF REGULARITY" IN AN ATTEMPT TO SATISFY THE CONSTITUTIONAL REQUIREMENT THAT THE TRIAL COURT MUST HAVE INSTRUCTED THE JURY TO FIND THE PETITIONER GUILTY ONLY IF HIS WORDS AMOUNTED TO "FIGHTING WORDS."

In the record of this case, there is no reproduction of the oral instruction that were given by the trial judge to the jury. The only indication is that

"the Court instructed the jury as to the law of the case." Appendix G at page 31a . Thus, it is uncertain whether the trial court gave an instruction which was designed to preclude conviction for uttering of protected expression. This Court has said that the possibility that conviction may have resulted for the uttering of such protected expression, is grounds for reversal. Gregory v. City of Chicago, 294 U.S. 111 (1969). Stromberg v. California, supra; Terminiello v. City of Chicago, supra.

Moreover, the first time that an express finding was made regarding the nature of Petitioner's utterance was in the Ohio Court of Appeals when that court concluded that Petitioner's words were clearly "fighting words." Appendix F at page 27a . However, the finding was outside the jurisdiction of that court to make, since only the trial court pursuant to a jury verdict had such authority. See Concurring Opinion of Mr. Justice Powell in Lewis v. New Orleans, supra, 415 U.S. at 135; Cohen v. California, supra, 403 U.S. at 26.

The District Court adopted the finding made by the Ohio Court of Appeals that Petitioner's words were "fighting words," Appendix D at page 20a.

In the Court of Appeals, however, the majority held that if there were a copy of the instruction before the court which indicated the failure of the trial judge to give the properly limited instruction, the Court would reverse for the possibility that Petitioner was convicted for uttering protected expression. The Court went on to say, however, that

the presumption of regularity required the Court to presume, in the absence of rebuttal evidence that the proper instruction was in fact given. Appendix C at page 9a .

Petitioner contends that under the circumstances of this case, the presumption of regularity was unwarranted, and the burden should have been placed upon the Respondents to show that the proper instruction was in fact given, and a failure of the showing should result in reversal. In the words of dissenting Judge McCree:

> "I would remand to permit the district court to conduct an evidentiary hearing to determine what instruction was given to the jury. If it cannot be established that the overbroad ordinance was given a narrowing instruction as required by the Constitution, I would grant the writ." Appendix C at page 10a .

This case involves the fundamental First Amendment right of free speech. Any state legislation which purports to regulate that right must be given strict scrutiny to ensure that it comports with constitutional requirements. Chaplinsky, supra; Gooding, supra; Rose v. Locke, supra; Smith v. Goguen, supra.

The principle underlying the term "strict scrutiny" is to effectively place the burden on the state to justify its action in light of the interests to be protected and the rights of individual who are subjected to the legislation. Terminiello, supra; Baggett v.

Bullitt, 377 U.S. 360 (1964); Grayned v. City of Rockford, 408 U.S. 104 (1972); Speiser v. Randall, 357 U.S. 513 (1958).

Thus, based on the nature of this case, and the importance of acts which regulate speech, the burden should be on the Respondents as a general proposition to bring forward the evidence that the proper instruction was given.

However, this case requires that result, a fortiori, due to is peculiar facts. Petitioner's trial was conducted on February 24-25, 1972. The key case which required reversal of conviction pursuant to overbroad disorderly conduct ordinances was not announced by this Court until March 23, 1972, twenty-seven days later (Gooding v. Wilson, supra). The Ohio Courts, however, showed their reluctance or inability to abide by the ruling in Gooding, supra, when on June 7, 1973, the Ohio Court of Appeals failed to provide the required construction (Appendix F) and on October 12, 1973, when the Ohio Supreme Court refused to hear the appeal at all because it felt no constitutional question existed. (Appendix E).

The Petition for Writ of Habeas Corpus was filed on February 12, 1974, and should have been granted at that time, but instead the District Court waited some fourteen months to issue its opinion based on the Ohio Supreme Court's reluctant opinion in Cincinnati v. Karlan, supra, which came as the result of a remand from this Court.

Therefore, all of the circumstances of this case point to the conclusion that there is no reason to believe that the trial court in this case gave the proper instruction, when as yet,

the ordinance had not been construed in a way differing from the facial content, which allowed conviction for uttering protected expression (Appendix I), and the higher courts of Ohio, including the Ohio Supreme Court, had not instructed the trial courts in their duties under the applicable decisions of this Court. If any presumption of regularity should be applied, it should be that the trial court applied the law as it believed it existed at the time of the trial, which was clearly that the ordinance as written was perfectly constitutional. This is shown by the trial court's denial of Petitioner's Motion to Dismiss on constitional grounds. Appendix G at page 28a . Thus it was error for the Court of Appeals to apply the presumption of regularity in a way which all the circumstances refute was the actual case.

This conclusion is fortified by 28 U.S.C. §2254 (Appendix I) which provides that factual findings of a state court are presumed correct when "evidenced by a written finding, written opinion, or other reliable and adequate written indicia." 28 U.S.C §2254 (d), Appendix I at page 34a . Of course, this section deals with finding of fact, but in this case, whether the proper instruction was given in the state court is a question of fact. Since there is no adequate record of this instruction, the Court of Appeals should not have presumed the instruction to be correct. U.S. v. Ross, 92 U.S. 281, 284-285 (1875). Furthermore, the power of a federal habeas corpus court is plenary, Townsend v. Sain, 372 U.S. 293, 312 (1963), and where the record is not

before the habeas court or it is ambiguous on some point that court must conduct a full evidentiary hearing on the matter. Anderson v. Texas, 507 F.2d 105 (5th Cir. 1975); In Re Parker, 423 F.2d 1021, 1024 (8th Cir. 1970); Williams v. Brewer, 509 F.2d 227 (8th Cir. 1975).

The need for an evidentiary hearing on what instruction was given is especially present when the ordinance is later declared constitutionally deficient (by the District Court, Appendix D at page 17a, and by the Court of Appeals, Appendix C at page 7a). U.S. ex rel Williams II v. Preiser, 497 F.2d 337, 338-39 (2d Cir. 1974).

Finally, there are instances when the presumption of regularity should not be applied at all. Where free speech or any other fundamental right is involved it cannot be presumed that the action of a licensing authority was correct. Re Porterfield, 28 Cal. 2d 91, 1968 P2d 706 (1946). Nor where there is a forfeiture of rights may the presumption be relied upon. Ohio ex rel Synod v. Joseph, 139 Ohio St. 229, 39 N.E.2d 575 (1942). In federal habeas corpus cases, although the general rule is that the applicant must show facts sufficient to warrant relief, there are cases in which the burden of proof shifts to the state. The burden is on the state to show that a defendant was not denied the effective assistance of counsel, Mosley v. Sutton, 367 F.2d 913, 916 (5th Cir. 1966); Smotherman v. Beto, 276 F.Supp. 579 (N.D. Tex. 1967); or that an in-court identification was not tainted by an illegal out-of-

court identification, Cooper v. Picard, 428 F.2d 1351 (1st Cir. 1970); or that a guilty plea was in fact voluntary, Jackson v. Denno, 378 U.S. 368 (1964); Stetson v. U.S., 417 F.2d 1250 (7th Cir. 1969); U.S. ex rel Farmer v. Rundle, 312 F.Supp. 685 (E.D. Pa. 1970); U.S. ex rel McCloud v. Rundle, 402 F.2d 853, 857 (3d Cir. 1968).

The Court must look to the totality of the facts to see if a presumption of regularity has been rebutted so as to place the burden of proof on the state, Miller v. Cruise, 346 F.2d 301 (10th Cir. 1965), in light of the preferred position of fundamental rights. Johnson v. Zerbst, 304 U.S. 458 (1937). Where the conduct of the trial court or the prosecution is not totally blameless in regard to the lack of a full record, the presumption of regularity may not be applied and the state has the burden to show that what transpired at trial did not lead to an unconstitutional conviction. Schultz v. Yeager, 293 F.Supp. 794 (D.N.J. 1967); see Sani-top v. N. Am. Aviation Inc., 261 F.2d 342 (9th Cir. 1958).

Petitioner contends that the presumption of regularity was erroneously applied against him to affirm a conviction which was obtained pursuant to an admittedly unconstitutional ordinance, when the circumstances of the case strongly suggest that an improper instruction was given in this case affecting fundamental First Amendment freedoms. The burden should have been placed on the Respondents to produce evidence of the nature of the instruction given, and the writ of habeas corpus should have been granted if no such evidence could be adduced due to a silent record.

CONCLUSION

For the reasons set forth above, certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
NO. 75-1740

DANIEL THOMPSON,
Petitioner-Appellant,
-v- ORDER
EDWARD GAFFNEY and WILLIAM HULL,
Respondents-Appellees.

Before: PECK, McCREE AND LIVELY, Circuit Judges.

Petitioner-appellant's petitioner for rehearing having come on to be considered and of the judges of this Court who are in regular active service less than a majority having favored ordering consideration en banc, the petition has been referred to the panel which heard the appeal, and it further appearing that the petition for rehearing is without merit,

IT IS ORDERED that the petition be, and it hereby is denied. Judge McCree would grant the petition for the reasons stated in his dissenting opinion.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman
Clerk of Court

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DANIEL THOMPSON,
Petitioner-Appellant,
-vs-
EDWARD GAFFNEY, et al.,
Respondent-Appellees

PETITION FOR REHEARING AND SUGGESTION THAT AN IN BANC HEARING IS APPROPRIATE

THIS CASE INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE.

This case involves freedom of speech.

The Supreme Court has said that freedom of speech calls for special judicial scrutiny. In Rose v. Locke, 96 S.Ct. 243 (1975), the Court upheld a state criminal statute but added:

> This is not a case in which the statute threatens a fundamental right such as freedom of speech so as to call for any special judicial scrutiny, see Smith v. Goguen, 415 U.S. 566, 572-573, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974). Id. at 244, n.3.

Petitioner suggests that the decision failed to reflect that special judical scrutiny.

The court relied on a "presumption of regularity" in a record which reflected a series of state court judicial opinions, not one of which had even reflected awareness of the necessary construction demanded by Gooding v. Wilson, 405 U.S. 518 (1972) and its progeny.

The unjustified "presumption of regularity" is set forth in the following section of this petitition.

THE PRESUMPTION OF REGULARITY IS NOT JUSTIFIED ON THE RECORD IN THIS CASE

Each event in this record shows that the presumption of regularity is unjustified.

First, the narrative record of the trial on February 24, 1972, could not have known of the required narrowing construction enunciated by the Supreme Court in Gooding v. Wilson, 405 U.S. 518 (1972) which was announded on March 23, 1972, 27 days later.

Second, the state intermediate court of appeals, on June 7, 1973, ignored the constitutional requirement. This has been noted both in the majority opinion (p.3) and by the District Court Judge.

Third, the State Supreme Court dismissed the appeal sua sponte because "no substantial constitutional question exists herein." On October, 1973, the same court's decision was vacated by the Supreme Court on April 15, 1974 for failing to narrow the Cincinnati ordinance, Karlan v. Cincinatti, 416 U.S. 924 (1974).

Fourth, the district court admitted that "absent an authoritative construction narrowing the application of the ordinance to "fighting words" . . .the ordinance would fall short of the United States Supreme Court's mandate that the state courts must . . .proscribe only [fighting words]."

Such was the situation on February 12, 1974, when the writ was filed in the District Court.

The writ should have issued at that time.

Instead, the District Court waited until May 6, 1975, a period of fourteen months to achieve the hindsight from reading a state court opinion which was amended in Cincinnati v. Karlan, 39 Ohio St.2d 107, 314 N.E.2d 162 (July 10, 1974).

Petitioner has at this moment been convicted through other cases, under an ordinance which is still facially overbroad. The majority admits this (slip opinion, p.3). The Respondent has not even argued it. Ibid. If "other cases" were sufficient, the Supreme Court would have considered the "other ordinance" in Chaplinsky v. New Hampshire, 315 U.S. 568 (1941) as dispositibe of Gooding v. Wilson, supra.

The Supreme Court did not rely on "other cases."

This court should impose the mandate of Gooding v. Wilson on the courts which considered the Cleveland Heights ordinance.

CONCLUSION

This is a petition for rehearing authorized by Rule 40, Rules of Appellate Procedure, coupled with a suggestion that a hearing en banc is appropriage, pursuant to Rule 35, Rules of Appellate procedure.

Appellate adopts the rationale of Judge McCree as expressed in the dissenting opinion

The admitted facial overbreadth of a statute which limits speech may not be "saved" by a presumption of regularity which by is own terms was impossible.

APPENDIX C

No. 75-1740

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DANIEL THOMPSON,

Petitioner-Appellant,

v.

EDWARD GAFFNEY AND WILLIAM HALL,

Respondents-Appellees.

APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed August 13, 1976.

Before: PECK, McCREE and LIVELY, Circuit Judges.

PECK, Circuit Judge, delivered the opinion of the court in which LIVELY, Circuit Judge, joined. McCREE, Circuit Judge, (p. 6) filed a separate dissenting opinion.

PECK, Circuit Judge. Petitioner-appellant Thompson was jury convicted on February 24, 1972, in Cleveland Heights Municipal Court of violating Cleveland Heights Codified Ordinance 931.01(a), *to wit,*

> *"Disorderly conduct.* It shall be unlawful for any person to willfully conduct himself in a noisy, rude, insulting, boisterous, or violent manner toward any other person or persons, by either word or act, which conduct disturbs the good order, peace and quiet of the City or any portion of its inhabitants."[1]

---

[1] Cleveland Heights had a similar ordinance as early as 1933. See *City of Cleveland Heights* v. *Christie*, 128 Ohio St. 297, 190 N.E. 770 (1934).

The evidence at trial indicated that Thompson, cited for "jaywalking" and arrested when he volunteered that "he was not going to court, and . . . might leave Ohio," called "in a loud voice with a crowd of young men and women present" the arresting police officers "motherfucking pigs." He apparently was sentenced to ninety (90) days in jail, fined $250 and assessed $180 in court costs.[2] The state court of appeals on June 7, 1973, sustained the conviction, rejecting, *inter alia*, Thompson's claim that the ordinance was unconstitutionally broad and vague. The Ohio Supreme Court on October 12, 1973, dismissed an appeal to it for want of a "substantial constitutional question."

On February 15, 1974, Thompson filed the instant petition for writ of habeas corpus in the district court, claiming that the ordinance was unconstitutionally overly broad, "not [having] been authoritatively construed as being limited to fighting words." On May 6, 1975, the district court denied the petition, because the state supreme court, in construing an "almost identical" ordinance in *Karlan* v. *City of Cincinnati*, 39 Ohio St. 107, 314 N.E.2d 162 (1974), sufficiently narrowed the Cleveland Heights ordinance, which otherwise would be unconstitutionally overly broad, to proscribe only unprotected speech.

On appeal, Thompson claims that he cannot be convicted under the Cleveland Heights ordinance because state courts have never cured its unconstitutional overbreadth. *Karlan* failed to cure the overbreadth, Thompson argues, because it came almost three years after his verbal onslaught of July 24, 1971, and because by concerning only the Cincinnati ordinance it neither "authoritatively construed," *Gooding* v. *Wilson*, 405 U.S. 518, 520, 522, 92 S. Ct. 1103, 1105, 1106, 31 L.Ed.2d 408

[2] Respondents-appellees have never challenged Thompson's allegation as to the sentence, fine and court costs, in his petition for writ of habeas corpus, but we have found nothing in the habeas record verifying Thompson's statement.

(1972), nor "limit[ed] or properly define[d]," *Lewis* v. *New Orleans*, 415 U.S. 130, 133, 94 S. Ct. 970, 972, 39 L.Ed.2d 214 (1974), nor gave a "satisfactory limiting construction" to, *Plummer* v. *City of Columbus*, 414 U.S. 2, 94 S. Ct. 17, 38 L.Ed.2d 3 (1973), the Cleveland Heights ordinance. Even if the ordinance had been properly limited, Thompson claims that the writ should have been granted because the municipal court judge never instructed the jury that it could convict only if it found Thompson's words to have been constitutional "fighting words," *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L.Ed. 1031 (1941).

We sustain the denial of habeas corpus.

Respondents-appellees, properly we think, make no assertion that the ordinance is sufficiently narrow on its face. Facially, and as "limited" by the state court of appeals' journal entry in Thompson's direct appeal, the ordinance remains constitutionally overly broad. See, e.g., *Lewis, supra*; *Plummer, supra*; *Gooding, supra*. Even though Thompson's words "might have been constitutionally prohibited under a narrowly and precisely drawn" ordinance, Thompson may still challenge the overbreadth of the ordinance to protect "the transcendent value to all society of constitutionally protected expression," lest "persons whose expression is constitutionally protected . . . refrain from exercising their rights for fear of criminal sanctions provided by [an ordinance] susceptible of application to protected expression." *Lewis, supra*, 415 U.S. at 133-134, 94 S. Ct. at 972-973, 39 L.Ed.2d at 219, quoting *Gooding, supra*, 405 U.S. at 520-521, 92 S. Ct. at 1105. Accord, e.g., *Walker* v. *Dillard*, — F.2d — (No. 73-1108, 4th Cir., filed July 10, 1975).

That the narrowing construction came three years after the verbal onslaught, however, does not preclude the construction from curing the unconstitutional overbreadth, *United States* v. *Thirty-seven Photographs*, 402 U.S. 363, 375, n. 3, 91 S. Ct. 1400, 1408 n. 3, 28 L.Ed.2d 822 (1971), *Dombrowski*, 380

U.S. 479, 491 n. 7, 85 S. Ct. 1116, 1123 n. 7, 14 L.Ed.2d 22 (1965), *Poulos* v. *New Hampshire*, 345 U.S. 395, 73 S.Ct. 760, 97 L.Ed. 1105 (1953), cf. *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 155, 89 S. Ct. 935, 22 L.Ed.2d 162 (1969), *Deeds* v. *Beto*, 353 F. Supp. 840, 842 (N.D. Tex. 1973), see *Lewis, supra*, provided the ordinance prior to the narrowing construction "afford[ed] fair warning to the defendants." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 59 S. Ct. 618, 83 L.Ed. 888 (1939); *Bouie* v. *Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L.Ed.2d 894 (1964); *Locke* v. *Rose*, 514 F.2d 570, 572 n. 3 (6th Cir.), rev'd on other grounds, — U.S. —, 96 S. Ct. 243, 46 L.Ed.2d 185 (1975).

Karlan, then, could have cured the unconstitutional overbreadth, notwithstanding it was decided almost three years after Thompson's verbal onslaught. The issue, then, is whether *Karlan* did, in fact, cure the unconstitutional overbreadth. Thompson argues that only an "authoritative constru[ction]" or "narrowing state court interpretation" of the particular Cleveland Heights ordinance could cure its unconstitutional overbreadth. Respondents just as adamantly argue that the narrowing construction of the "almost identical" Cincinnati ordinance cured the unconstitutional overbreadth. Though neither Thompson nor respondents have cited a case expressly holding that a construction of an "almost identical" ordinance, or statute, can or cannot sufficiently cure the unconstitutional overbreadth of the particular ordinance, or statute, in question, *Wright* v. *City of Montgomery*, 406 F.2d 867, 874, 875 (5th Cir. 1969), *vacated on other grounds*, 401 U.S. 989, 91 S. Ct. 1218, 28 L.Ed.2d 528 (1971), recognized that state court constructions of "similar" and "substantially identical" ordinances cured unconstitutional overbreadth. A district court expressly adopted respondents' view in *Pritikin* v. *Thurman*, 311 F. Supp. 1400, 1401 (S.D. Fla. 1970).

> "[W]hile the Florida courts have not considered this ordinance, the construction they may have placed on

> ordinances or statutes similar to the one at bar are binding on this court just as if those words had beer written into the ordinance itself. . . ."

Accord, *Livingston* v. *Garmire*, 308 F. Supp. 472, 474 (S.D. Fla. 1970), *aff'd*, 437 F.2d 1050 (5th Cir.), *opinion withdrawn on other grounds*, 442 F.2d 1322 (5th Cir. 1971).

In addition to *Karlan*, Ohio appellate courts have narrowly construed "similar" disorderly conduct ordinances in *Columbus* v. *Schwarzwalder*, 39 Ohio St.2d 61, 313 N.E.2d 798 (1974), and *City of Kent* v. *Kelley*, 44 Ohio St.2d 43, 337 N.E.2d 788 (1975).

Finally, Thompson claims that the municipal judge failed to instruct the jury that it could convict only for constitutional "fighting words." If we had before us a transcript demonstrating that the jury was not so instructed, we would hold that the writ should have been granted because of the possibility that the jury convicted Thompson for protected speech. See *State* v. *Schwing*, 42 Ohio St.2d 295, 306, 328 N.E.2d 379 (1975); cf. *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87, 92, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965); *Terminiello* v. *City of Chicago*, 337 U.S. 1, 69 S. Ct. 894, 93 L.Ed. 1131 (1949). However, in the absence of a transcript of the court's instructions to the jury, and according to the state proceedings the presumption of regularity to which they are entitled, we have no alternative but to hold that Thompson has failed in carrying his burden of proving that the jury was not properly instructed. *Allen* v. *Perini*, 424 F.2d 134, 138 (6th Cir.), *cert. denied*, 400 U.S. 906, 91 S. Ct. 147, 27 L.Ed.2d 143 (1970); *Phillips* v. *Black*, 367 F. Supp. 774 (E.D. Ky. 1973), *aff'd*, 497 F.2d 924 (6th Cir. 1974); *Goins* v. *Brierley*, 464 F.2d 947 (3rd Cir. 1972).

The responsibility of placing the charge before us was that of the appellant, and it would seem improper to place the onus of his not having done so on the appellees in this habeas

corpus proceeding which attacks a judgment of conviction arising from a trial which was held more than four and one-half years ago.

Affirmed.

McCree, Circuit Judge (Dissenting).

I respectfully dissent. Petitioner was convicted of violating an ordinance which, as the majority opinion recognizes and appellees concede, is unconstitutionally overbroad not only on its face, but also as it was construed by the state court of appeals when it heard petitioner's appeal in 1973. I do not think that the "presumption of regularity" can be stretched far enough to support the majority's holding that the municipal court judge gave an instruction at petitioner's trial in 1972 that was limited to fighting words as required by the Constitution. I find it impossible to presume that the municipal judge anticipated by almost three years the construction given in 1974 to a similar ordinance by the state supreme court, which in 1973 had dismissed petitioner's appeal *sua sponte* because "no substantial constitutional question exists herein."

I would remand to permit the district court to conduct an evidentiary hearing to determine what instruction was given to the jury. If it cannot be established that the overbroad ordinance was given a narrowing instruction as required by the Constitution, I would grant the writ.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DANIEL THOMPSON Petitioner -vs- EDWARD GAFFNEY, et al. Respondents	NO.C74-151 MEMORANDUM OPINION AND ORDER LAMBROS, DISTRICT JUDGE

Daniel Thompson ("Thompson") filed the above-captioned petition for a writ of habeas corpus, pursuant to 28 U.S.C. §2254, against respondents Edward Gaffney, Cleveland Heights Chief of Police, and William Hull, Superintendant of the Cleveland House of Correction. Thompson also filed an application for release on personal recognizance pending the disposition of the petition. The Court granted the application for release from the House of Correction, and later amended that Order to provide that petitioner be placed on $1,000.00 personal bond pending the outcome of this matter.

In the petition, Thompson challenges his detention resulting from a conviction under a Cleveland Heights ordinance, which ordinance petitioner claims is overly broad and has not been authoritatively construed by the Ohio courts in accordance with the law. Petitioner contends that the ordinance is unconstitutional as applied to him, as well as on its face; and, therefore, he

seeks an Order from this Court discharging him from custody.

This Court held an evidentiary hearing at which the Court also permitted the parties to present legal arguments regarding the constitutionality of the ordinance in question. The Court took this matter under advisement and deferred ruling on the matter in light of the uncertain status of several Ohio cases involving the constitutionality of similar ordinances which were before the United States Supreme Court and which were subsequently remanded to the Ohio Supreme Court. The Ohio Supreme Court has now rendered a controlling decision in one of those matters and the Supreme Court has denied certiorari. Accordingly, the following are the Court's findings of fact and conclusions of law in this matter.

FACTUAL BACKGROUND

Petitioner was arrested for "jaywalking" in Cleveland Heights, Ohio on July 24, 1971. He was not prosecuted on that charge. However, on December 1, 1971, over four months later, petitioner was charged by affidavit with having engaged in disorderly conduct on July 24, 1971, in violation of Section 931.01(a) of the Codified Ordinances of Cleveland Heights. 1/ Upon a jury verdict of guilty for the violation of that ordinance, the Cleveland Heights Municipal Judge sentenced the petitioner to ninety days in jail, fined him $250.00 and assessed him $180.00 in court costs.

Petitioner appealed that conviction on constitutional grounds to the Court of Appeals of Ohio, Eighth District. The Court of Appeals affirmed the conviction, finding that the ordinance and the arrest and conviction pursuant thereto were constitutionally valid. The Ohio Supreme Court dismissed petitioner's subsequent appeal, sua sponte, for lack of a substantial constitutional question. Although the United States Supreme Court stayed execution of sentence pending the filing of a notice of appeal in that Court, the petitioner's notice was not timely filed, and the stay was vacated on February 8, 1974. Petitioner had been on bail during the entire appellate process, but the stay having been vacated, petitioner was arrested on February 15, 1974 and ultimately taken to the Cleveland House of Correction to begin execution of the ninety-day sentence. Petitioner thereupon filed his petition for a writ of habeas corpus in this Court.

1/ The affidavit reads in pertinent part: " . . .that on or about the 24th day of July at about 12:30 p.m. A.D. 1971 at the said City, County and State, one Daniel Thompson did unlawfully and wilfully at or near 1815 Coventry Road, Cleveland Heights, Ohio, disturb the good order, peace and quiet of the City by conducting himself in a noisy, rude, insulting, boisterous, or violent manner toward other persons, contrary to Section 931.01(a) of the Codified Ordinances and against the peace and dignity of the City of Cleveland Heights, Ohio."

JURISDICTION

Petitioner has exhausted his state remedies as required by 28 U.S.C. §2254. This Court has jurisdiction to consider his constitutional attack on the Cleveland Heights disorderly conduct ordinance and to determine the lawfulness of petitioner's custody as a result of his conviction under that ordinance.

CONSTITUTIONALITY OF SECTION 931.01(a) OF THE CODIFIED ORDINANCES OF THE CITY OF CLEVELAND HEIGHTS

The Cleveland Heights Ordinance in question reads:

"It shall be unlawful for any person to wilfully conduct himself in a noisy, rude, insulting, boisterous, or violent manner toward any person or persons, by either word or act, which disturbs the good order, peace and quiet of the City or any portion of its inhabitants."

At the hearing in this matter, petitioner did not dispute the fact that the words which he was charged with having spoken have been held to be constitutionally punishable under criminal disorderly conduct ordinances. 2/

2/ Petitioner was charged with violation of the Cleveland Heights ordinance and subsequently convicted by a jury for calling two Cleveland Heights policemen "motherfucking pigs" in the presence of others on a street within city limits. These policemen were the prosecuting witnesses.

However, he contends that the ordinance under which he was convicted is vague and overbroad and is facially invalid under the First and Fourteenth Amendments to the United States Constitution and that his conviction must, therefore, be set aside.

The United States Supreme Court has received a number of requests in recent years for review of convictions secured pursuant to disorderly conduct and other similar ordinances in which convicted defendants have challenged such ordinances as unconstitutionally vague and overbroad. As a result, a rather definite standard has been developed for testing the constitutionality of such ordinances. In several cases, the Court has struck down a challenged ordinance where that ordinance punished spoken words only, was susceptible of application to expression protected under the First Amendment and had not been authoritatively construed by the state court as limited to the utterance of "fighting words," defined in Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) and reaffirmed in Gooding v. Wilson, 405 U.S. 518, 523 (1972), as "...those [words] which by their very utterance inflict injury or tend to incite to an immediate breach of the peace." Lewis v. New Orleans, 415 U.S. 130 (1974); Plummer v. Columbus, 414 U.S. 2 (1973); Carson v. Columbus, 409 U.S. 1053.

In the instant action, the Cuyahoga County Court of Appeals, Eighth District, in affirming the judgment of conviction, held that:

> The profanity uttered by the appellant at the prosecuting witnesses clearly falls within the meaning of the Chaplinsky case "...words whose speaking constitute a breach of the peace by the speaker-including 'classical fighting words,' words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats." (Journal Entry, June 7, 1973)

However, although the language used by petitioner was found to fall within the realm of "fighting words" by the Ohio Court of Appeals and the Ohio Supreme Court dismissed petitioner's appeal, sua sponte, for lack of a substantial constitutional question, absent an authoritative construction narrowing the application of the ordinance to "fighting words," the petitioner has standing to raise the vagueness or unconstitutional overbreadth of the Cleveland Heights ordinance as applied to others. Plummer v. Columbus, supra, 414 U.S. at p. 3.

In response to petitioner's constitutional challenge, the Court of Appeals held:

> The ordinance refers to both words and acts but couples its structures to a wilfull direction toward others in a manner constituting a verbal act where words alone are at issue. More simply, the ordinance proscribes the so-called "fighting words." (Journal Entry, p. 3)

In light of this, counsel for the respondent in his brief filed herein argues that this ordinance does not even fall within the Chaplinsky or Gooding case and their progeny since the Cleveland Heights ordinance does not punish spoken words but punishes only words which are of such a character as to become verbal acts.

The Court of Appeals further stated that the ordinance in question has four components:

> Prohibited conduct must be (1) noisy, rude, insulting, boisterous or violent; (2) by either word or deed, (3) it must be directed toward other persons, and (4) disturb the good order, peace or quiet of the city or any portion of its inhabitants.

And, the Court held that unless the elements coalesce, there can be no violation.

However, such a construction of this ordinance would appear to fall short of the United States Supreme Court's mandate that the state courts must construe such an ordinance to proscribe only the use of words "'which by their very utterance inflict injury or tend to incite an immediate breach of the peace.'" Lewis, citing to Chaplinsky and Gooding, supra 414 U.S. at p. 523. For example, four of the elements in the Cleveland Heights ordinance which may coalesce and thereby apparently constitute criminal conduct are: 1) rudeness; 2) by word; 3) directed at other persons; 4) that disturbs the peace and quiet of the city.

The Supreme Court recently vacated judgments of conviction in four cases and remanded those cases to the state courts for consideration in light of the Court's decision in Lewis v. New Orleans, supra. Karlan v. Cincinnati, 40 L.Ed.2d 280 (1974); Kelly v. Ohio, 40 L.Ed.2d 280 (1974); Rosen v. California, 40 LEd 2d 280 (1974); and Lucas v. Arkansas, 40 LEd 2d 277 (1974).

The Ohio Supreme Court has now rendered its decision on remand in Karlin v. Cincinnati, 314 NE 2d 162 (1974), which involved an ordinance which proscribed certain conduct, which is almost identical to the ordinance at issue herein. 3/ The Ohio Supreme Court stated on remand that even though that ordinance did not punish only spoken words, that in light of Lewis v. New Orleans, supra, it was apparent that the ordinance was "capable of punishing spoken words and, in that respect, must be authoritatively narrowed or be held constitutionally overbroad." Id. 314 NE 2d at p. 164.

The Court, in an apparent effort to abide by the Supreme Court guidelines, held:

3/ Cincinnati Ordinance 901-d4 reads: "It shall be unlawful for any person to wilfully conduct himself or herself in a noisy, boisterous, rude, insulting or other disorderly manner with the intent to abuse or annoy any person or the citizens of the city or any portion thereof."

> "The principal pull and haul between state courts and the high court has centered around a definition of 'protected speech.' However, there appears to be no room left for argument today. A majority of the United States Supreme Court has said that no matter how rude, abusive, offensive, derisive, vulgar, insulting, crude, profane or opprobrious spoken words may seem to be, their utterance may not be made a crime unless they are fighting words, as defined by that tribunal. Furthermore, the court has stated that those descriptive words in and of themselves are constitutionally overbroad and must be rendered unsusceptible of application to protected speech by appropriate judicial decision.
>
> Therefore, persons may not be punished under Section 901-d4, Code of Ordinances of Cincinnati, for speaking boisterous, rude or insulting words, even with the intent to annoy another, unless the words by their very utterance inflict injury or are likely to provoke the average person to an immediate retaliatory breach of the peace. Id. at pp. 164-165 (Citations omitted.)"

However, after so construing the ordinance, and authoritatively narrowing such an ordinance for the first time, the Ohio Supreme Court then held:

> Insofar as appellant Karlan is concerned, we adhere to our former

judgment. For, where epithets, used in a public place and wilfully directed at those who can hear them, are likely to provoke the average person to an immediate retaliatory breach of the peace, they are fighting words and the utterance thereof may be punished as a criminal act. Cincinnati v. Karlan, supra (35 Ohio St. 2d 34, 298 N.E. 2d 573.)

Karlan petitioned the United States Supreme Court for a writ of certiorari for review of this judgment. The Supreme Court has denied that petition. 40 L.Ed. 2d 280 (1974).

The authoritative construction in the Karlan case of the Cincinnati ordinance which is almost identical to the ordinance involved herein sufficiently limits its possible future application to protected areas of speech. Moreover, in Karlan, the Ohio Supreme Court abandoned its previous reliance upon the distinction between those ordinances which punish spoken words only and those ordinances which the Ohio Court upheld because they proscribed verbal acts deemed to be conduct.

In the instant case, as stated above, the Court of Appeals, in upholding petitioner's conviction under the Cleveland Heights Ordinance, specifically concluded that petitioner's "profanity" clearly fell within the Chaplinsky definition of "fighting words." And, although this alone does not bar the petitioner from raising the vagueness or

unconstitutional overbreadth of the ordinance as applied to others, Plummer v. Columbus, supra, the Ohio Supreme Court has now spoken as to the limited construction such an ordinance must be given if its application as to others is to withstand constitutional muster.

CONCLUSION

This Court concludes that petitioner herein is not entitled to relief from his conviction pursuant to the Cleveland Heights ordinance. The Court of Appeals having found the petitioner's utterances to have been fighting words, which words petitioner himself did not contest have been held to fall within the definition of "fighting words," and the Ohio Supreme Court having denied an appeal from petitioner's conviction, the Court finds that the utterance of those words may have been punished as a criminal act under the Cleveland Heights ordinance and that Ordinance is now limited in its future application to "fighting words" in light of the Ohio Supreme Court's construction of the similar Cincinnati disorderly conduct ordinance.

Accordingly, petitioner's motion for the issuance of a writ of habeas corpus is denied. This case is hereby terminated and dismissed.

IT IS SO ORDERED.

/S/ _____
Thomas D. Lambros
United States District
Judge

DATED: 4/30/75

APPENDIX E

SUPREME COURT OF THE STATE OF OHIO

City of Cleveland Heights,
Appellee, 1973 Term
-v- 12 October
Daniel Thompson,
Appellant.

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

APPENDIX F

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

City of Cleveland Heights,
Plaintiff-Appellee,
-v- 7 June 1973
Daniel Thompson,
Defendant-Appellant.

JOURNAL ENTRY

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Cleveland Heights Municipal Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Cleveland Heights Municipal Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made;

The appellant, upon being arrested for jaywalking, informed the arresting officer that he had no intention of paying the fine and might in fact leave the state. The appellant was then detained until a patrol car arrived to transport him to the city jail. While resisting attempts at being placed in the patrol car, appellant hurled epithets at the officers. To put it with some delicacy, he referred to the officers as swine with an Oedipus history. This behavior ultimately led to a charge of disorderly conduct and it is from his conviction on this charge that the appellant is now appealing.

Three assignments of error are argued by the appellant. For the reasons which appear below, we find these assignments are without merit. The judgment of the trial court is affirmed.

Assignment of Error No. 1:

"The Court Below Erred in Overruling the Appellant's Motion to Dismiss the Charges against Him."

The appellant argues that the ordinance in question, Section 931.01(a), Codified Ordinances, City of Cleveland Heights, was unconstitutionally broad and vague, and that the court below erred by not granting the motion to dismiss made on these grounds.

The ordinance has four components. Prohibited conduct must be (1) "noisy, rude, insulting, boisterous or violent", (2) by either word or deed, (3) it must be directed toward other persons, and (4) disturb "the good order, peace and quiet of the city or any portion of its inhabitants." Unless these elements coalesce there is no violation. Because First Amendment values are put in issue by the constitutional attact upon the ordinance we must assess its effects from the standpoint of the preferred position of those values, Schneider v. Irvington (1939), 308 U.S. 147, 161; Prince v. Massachusetts (1944), 321 U.S. 158, 164; Saia v. New York (1948), 334 U.S. 558, 562; Thomas v. Collins (1945), 323 U.S. 516,530; NAACP v. Button (1963), 371 U.S. 415, 438. At the same time we must, if we are able, find a basis for avoiding "the consti-

tutional issues and especially a constitutional decision overriding a legislative act." Cleveland v. Mechanic (1971), 26 Ohio App.2d 138, 148; Street v. New York (1969), 394 U.S. 576, 581.

Read carefully in the light both of First Amendment primacy and the necessity of avoiding constitutional issues we find we cannot avoid the constitutional issue. However, this does not end the matter. In our view the ordinance is drawn in a manner which meets constitutional standards. The ordinance refers to both words and acts but couples its stricture to a wilful direction toward others in a manner constituting a verbal act where words alone are at issue. More simply, the ordinance proscribes the so-called "fighting words." Cf. Cohen v. California (1971), 403 U.S. 15,20, citing Chaplinsky v. New Hampshire (1942) 315 U.S. 568. (Cohen involved only strong words written on a jecket characterizing the defendant's view of the draft. The conviction was reversed.)

The words used here were intended to insult[1] and the record shows that other "inhabitants"[2] besides the police were present although the presence of the police alone has been held suffi-

1. A substantially similar ordinance was interpreted by the Supreme Court of Ohio about forty years ago. In that case, Cleveland Heights v. Christie (1934), 128 Ohio St. 297, 300, it was held the word "bastard" applied "in anger, as an epithet, has been standard usage in the terminology of insult." A conviction under the ordinance was affirmed.

cient. See Lima v. Freeman (Allen Cty., 1971), 27 Ohio App.2d 72,76. The words have an epithet quality clearly directed at the policemen. That the latter were professional enough to restrain themselves does not mitigate the provocation. The limited language of the ordinance constitutionally restrains such conduct. Thus, there was no mix of constitutionally protected speech and unprotected acts.

". . .[A] statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a ciminal law." Chaplinsky v. New Hampshire, supra, 574.

Assignment of Error No. 2

"The Proof Offered by the Prosecution Failed."

The appellant suggests that there was a failure of proof because none of the prosecuting witnesses were provoked to violence. This position is untenable. The ordinance seeks to prevent violent confrontations before they start by prohibiting the types of conduct or types of words likely to cause a breach of the peach. The profanity uttered by the appellant at the prosecuting witnesses clearly falls

---

2. Appellant would apparently have us interpret "inhabitants" to mean only "residents." We are not ready to Balkanize the community to that degree.

within the meaning of the Chaplinsky case; ". . . words whose speaking constitute a breach of the peace by the speaker-including 'classical fighting words', words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats." Chaplinsky v. New Hampshire, supra, 573.

It is the likelihood or probability of violence which the ordinance seeks to prevent. Once confrontation has matured into contact, an action in battery or assault might lie, but prevention is the aim of the ordinance and not redress.

The appellant further suggests that the proof fails because it shows only that several policemen were involved and these were not proven to be inhabitants of Cleveland Heights. We disposed of this contention under the first assignment of error. See Lima v. Freeman, supra and footnote 2.

Assignment of Error No. 3.

"Where a finding of Guilt Under A Disorderly Conduct Ordinance is Based on a Mix, Partially for What is Said in Exercise of Free Speech and Partially for What is Illegally Done, the Conviction Cannot Stand."

This asssignment of error falls under the weight of the disposition of the first assignment of error. We pointed out there that the words in question properly fell within the classification of verbal acts. Therefore, there was no mix of constitutionally protected speech and unprotected acts.

The judgment of the trial court is affirmed.

APPENDIX G

CITY OF CLEVELAND HEIGHTS	)	CASE NO 68120
Plaintiff	)	
-vs-	)	STATEMENT OF THE EVIDENCE
DANIEL THOMPSON	)	
Defendant	)	

The case of City of Cleveland Heights v. Daniel Thompson, Cleveland Heights Municipal Court Case No. 68120, came on for a trial by jury on February 24, 1972.

No court reporter had been requested, and there was no record made during the course of the trial.

Representing the plaintiff, City of Cleveland Heights was Paul Brickner, Esq., who was then the Prosecutor. Representing the defendant, Daniel Thompson, were Anthony A. Walsh, Esq., and Eugene S. Bayer, Esq.

The defendant was charged by affidavit with a violation of Section 931.01(a) of the Codified Ordinances of the City of Cleveland Heights.

The defendant had previously entered a plea of "not guilty."

Following opening statements, counsel made an oral motion to dismiss the case on constitutional grounds, which motion was overruled.

The plaintiff then presented the following testimony; upon which cross-examination was conducted by the defendant:

Patrick J. Norris, a police officer employed by the plaintiff testified, under oath, that while on duty on the evening of July 23, 1971, and the

early morning of July 24, 1971, he observed the defendant, who he identified in open court, "jaywalk" across Coventry Road within the City of Cleveland Heights, and that he then cited the defendant for said offense.

He further testified that the defendant stated to him that he was not going to pay the ticket, that he was not going to court, and that he might leave Ohio.

He further testified that based upon these statements, he believed that an appearance bond would be necessary, and that he detained the defendant for the purpose of transporting the defendant to the police station.

He further stated that the defendant resisted attempts to place him in the police car when it arrived and that in a loud voice with a crowd of young men and women present, the defendant called the police officers "motherfucking pigs." The officer stated that he was disturbed by the actions, and the aforesaid statement of the defendant.

He further stated that the defendant was charged with disorderly conduct, and conveyed to the police station.

Eugene DeSantis, a police officer employed by the plaintiff stated, under oath, that on the morning of July 24, 1971, he saw the defendant "jaywalk" across Coventry Road. He identified the defendant in open court.

He further stated that after the defendant stated that he would not be around to pay the fine or go to court, the defendant was notified that he was

to be taken to the police station. He had to be helped into the police car, and in a loud voice, with a number of persons gathered near the scene, the defendant called the police "motherfucking pigs." The witness stated that he was offended by the loud statement of the defendant.

Albert Kaminsky, a police officer employed by the plaintiff stated upon oath that he was on duty at the scene, and that when the defendant, who he identified in open court, was told to put his hands on the police car, he called the officers, in a loud voice "motherfucking pigs."

The plaintiff then rested.

The defendant then presented the following testimony; upon which the plaintiff conducted corss-examination:

David Nelson, who stated under oath that he was seated on a bench on or near Coventry Road when he saw Patrolman Norris cite the defendant for "jaywalking."

He further stated that he saw a conversation between several police officers and the defendant but that he could not hear it, but that later he did hear the defendant speak in a loud voice. He did not recall hearing the defendant utter any obscenities, nor did he think that he was violent.

John Wetzel, stated under oath that he observed the situation through the closed door of a pizza shop on Coventry Road, but that he could not hear anything because of the glass in the door. He stated that the defendant did not appear violent.

Daniel Thompson, the defendant, stated under oath that when he was cited

for "jaywalking" he told police that he didn't believe in paying fines, that he was going to leave Ohio, and that if they wanted him they would have to take him to jail and feed him.

He further stated that he did not resist the efforts of the officers to detain him, but that one officer suggested that he be cited for disorderly conduct. He stated that thereafter the officers treated him in a rough manner, and that as he was being driven away he yelled "superpolice."

He denied calling the offers "motherfucking pigs."

The defendant then rested.

Following closing arguments by counsel for the parties, the Court instructed the jury as to the law of the case.

Thereafter the jury retired to deliberate.

The jury returned a verdict of quilty.

On February 25, 1972, the Court sentenced the defendant, according to law.

Kenneth S. Nash
Judge

APPENDIX H

STATE OF OHIO)
CUYAHOGA COUNTY) SS:
CITY OF CLEVELAND HEIGHTS)

AFFIDAVIT
IN THE CLEVELAND HEIGHTS MUNICIPAL COURT

Before me, Louis N. Farr, Clerk of the Cleveland Heights Municipal Court, personally came Patrick J. Norris who being duly sworn according to law, deposes and says, that on or about the 24th day of July at about 12:20 A.M. A.D. 1071 at the said City, County and State, one Daniel Thompson did unlawfully and wilfully at or near 1315 Coventry Road, Cleveland Heights, Ohio, disturb the good order, peace and quiet of the City by conducting himself in a noisy, rude, insulting, boisterous, or violent manner toward other persons, contrary to Section 931.01(a) of the Codified Ordinances and against the peace and dignity of the City of Cleveland Heights, Ohio.

/s/ Patrick J. Norris

Sworn to and subscribed before me this 1 day of Dec. A.D. 1971. Louis N. Farr, Clerk of the Cleveland Heights Municipal Court.

by /s/ Sgt. Cohen, Deputy Clerk

APPENDIX

FIRST AMENDMENT TO THE CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT TO THE CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT TO THE CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX I

SECTION 931.01(a), CODIFIED ORDINANCES OF THE CITY OF CLEVELAND HEIGHTS

> "It shall be unlawful for any person to wilfully conduct himself in a noisy, rude, insulting, boisterous or violent manner toward any person or persons, by either word or act, which disturbs the good order, peace, and quiet of the City or any portion of its inhabitants."

28 U.S.C. §2254 (d)

"In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--

> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;

> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant,

otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

SECTION 901-D4, CINCINNATI MUNICIPAL CODE

§901-D4. Disorderly Conduct.

No person shall wilfully conduct himself or herself in a noisy, boisterous, rude, insulting or other disorderly manner, with the intent to abuse or annoy any person or the citizens of the city or any portion thereof, or disturb the peace, good order and quiet of the city by provoking or engaging in a fight or quarrel, or permit or suffer such act or acts made unlawful herein to be committed on or about his or her house, or any premises attached thereto.

For the purpose of enforcing the provisions of this section, it shall be lawful for any officer to enter any house, outhouse, garden or place of amusement to arrest any person violating any of the provisions of this section.

Whoever violates this section shall be fined nor more than one hundred dollars ($100.00), or imprisoned not more than thirty (30) days, or both, for a first offense, and for a second or subsequent offense shall be fined not more than one hundred dollars ($100.00), or imprisoned not more than ninety (90) days, or both.

(C.O. 901-d4; a. Ord. No. 255-1963, eff. July 3, 1963)

APPENDIX J

IN THE SUPREME COURT OF OHIO

CITY OF CINCINNATI,

Appellee,

vs.

STEVE KARLAN,

Appellant.

---

1. Under Section 901-d4, Code of Ordinances of Cincinnati, persons may not be punished for speaking boisterous, rude or insulting words, even with the intent to annoy another, unless the words by their very utterance inflict injury or are likely to provoke the average person to an immediate retaliatory breach of the peace. (*Cantwell* v. *Connecticut,* 310 U.S. 296; *Chaplinsky* v. *New Hampshire,* 315 U.S. 568; *Terminiello* v. *Chicago,* 375 U.S. 1; *Cohen* v. *California,* 403 U.S. 15; *Gooding* v. *Wilson,* 405 U.S. 518; *Lewis* v. *New Orleans,* U.S. , 39 L.Ed.2d 214.)

2. Where epithets, used in a public place and wilfully directed at those who can hear them, are likely to provoke the average person to an immediate retaliatory breach of the peace, they are fighting words, and the utterance thereof may be punished as a criminal act. (*Cantwell* v. *Connecticut,* 310 U.S. 296; *Chaplinsky* v. *New Hampshire,* 315 U.S. 568; *Cohen* v. *California,* 403 U.S. 15; *Gooding* v. *Wilson,* 405 U.S. 518.)

3. Where a defendant has been asked by a uniformed police officer if he has permission to tamper with an automobile parked in a police impoundment area and responds with the shouted statement, "I hate all of you fucking cops," and upon the officer's further inquiry states, "get out of my way you fucking, prick-ass cops," and, thereafter, twice calls the officer a "prick-assed cop," Section 901-d4, Code of Ordinances of Cincinnati, as limited and construed herein, represents a constitutional criminal prohibition against the speaking of such words under such circumstances, since the words, under those circumstances, are fighting words and do not constitute speech which is protected by the First and Fourteenth Amendments to the United States Constitution.

(No. 72-842—Decided July 10, 1974.)

ON REMAND from the United States Supreme Court.

The facts in this case are set out in our original opinion. *Cincinnati* v. *Karlan* (1973), 35 Ohio St. 2d 34, 298 N. E. 2d 573.

Mr. Thomas A. Luebbers, city solicitor, *Mr. Ralph E. Cors* and *Mr. John S. Moraites* and *Miss Dolores Hildebrandt,* for appellee.

Mr. Andrew B. Dennison, for appellant.

HERBERT, J. Following our judgment in this case, appellant appealed to the United States Supreme Court. Under a mandate of May 14, 1974, that court vacated our judgment and remanded the cause to this court for further consideration in light of *Lewis* v. *New Orleans* (1974), U.S. , 39 L. Ed. 2d 214, which was decided subsequent to the publication of our first opinion.

The next to last paragraph of the majority opinion in *Lewis* states:

"In sum * * * [the New Orleans ordinance under consideration] punishes only spoken words. It can therefore withstand appellant's attack upon its facial constitutionality only if, as authoritatively construed by the Louisiana Supreme Court, it is not susceptible of application to speech, although vulgar or offensive, that is protected by the First and Fourteenth Amendments. * * * Since * * * [the ordinance], *as construed by the Louisiana Supreme Court,* is susceptible of application to protected speech, the section is constitutionally overboard and therefore is facially invalid." (Emphasis added.)

As we read *Lewis,* and the cases cited therein, the apparent deficiency found in our first opinion in *Karlan* centers around a reliance in that case upon the construction of Cincinnati Ordinance 901-d4, which is contained in *Cincinnati* v. *Hoffman* (1972), 31 Ohio St. 2d 163, 285 N. E. 2d 714, certiorari denied, 410 U. S. 920. Since *Hoffman* involved only conduct, and *Karlan* only speech, the conclusion from *Lewis* and the remand now before us is that an authoritative statutory construction pertaining to conduct may not be relied upon in a case involving speech, even though it be obvious that the particular speech under consideration is not constitutionally protected.

Cincinnati Ordinance 901-d4 reads, as follows:

"It shall be unlawful for any person to wilfully conduct himself or herself in a noisy, boisterous, rude, insulting or other disorderly manner, with the intent to abuse or annoy any person or the citizens of the city or any portion thereof."

Viewed in light of *Lewis* v. *New Orleans, supra,* it is clear that this ordinance does not punish "only spoken words." However, it is just as apparent that it is capable

of punishing spoken words and, in that respect, must be authoritatively narrowed or be held constitutionally overbroad.

A considerable line of United States Supreme Court cases has consistently, and insistently, held that the uttering of words which are "rude" or "insulting" may not be prohibited, "although vulgar or offensive." *Id.,* at page 219. However, as noted in the syllabus of our original *Karlan,* when the words of rudeness or insult reach a point where they become "fighting words" they may be regulated by criminal statute and their utterance may be constitutionally punished.

As has been made abundantly clear by the United States Supreme Court, a criminal statute capable of punishing spoken words cannot stand constitutional muster unless "authoritatively construed" by state courts to be inapplicable to speech which is protected by the First and Fourteenth Amendments. *Lewis, supra,* and cases cited.

The principal pull and haul between state courts and the high court has centered around a definition of "protected speech." However, there appears to be no room left for argument today. A majority of the United States Supreme Court has said that no matter how rude, abusive, offensive, derisive, vulgar, insulting, crude, profane or opprobrious spoken words may seem to be, their utterance may not be made a crime unles they are fighting words,[1] as defined by that tribunal. Futhermore, the court has stated that those descriptive words in and of themselves are constitutionally overbroad and must be rendered unsusceptible

[1] We are not here dealing with another troublesome word, "obscene." Suffice it to say, however, it would appear that the high court has concluded to date that no spoken words are obscene unless they serve to erotically stimulate. *Cohen* v. *California* (1971), 403 U. S. 15, 20.

of application to protected speech by appropriate judicial decision.

Therefore, persons may not be punished under Section 901-d4, Code of Ordinances of Cincinnati, for speaking boisterous, rude or insulting words, even with the intent to annoy another, unless the words by their very utterance inflict injury or are likely to provoke the average person to an immediate retaliatory breach of the peace. *Cantwell* v. *Connecticut* (1940), 310 U.S. 296; *Chaplinsky* v. *New Hampshire* (1942), 315 U. S. 568; *Terminiello* v. *Chicago* (1949), 337 U. S. 1; *Cohen* v. *California* (1971), 403 U. S. 15; *Gooding* v. *Wilson* (1972), 405 U. S. 518; *Lewis* v. *New Orleans, supra.*

Insofar as appellant Karlan is concerned, we adhere to our former judgment. For, where epithets, used in a public place and wilfully directed at those who can hear them, are likely to provoke the average person to an immediate retaliatory breach of the peace, they are fighting words and the utterance thereof may be punished as a criminal act. *Cincinnati* v. *Karlan, supra* (35 Ohio St. 2d 34.)

Judgment reaffirmed.

CORRIGAN, CELEBREZZE and P. BROWN, JJ., concur.

O'NEILL, C. J., STERN and W. BROWN, JJ., dissent.

O'NEILL, C. J., dissenting. The ordinance in question here, Cincinnati Ordinance 901-d4, neither mentions nor is concerned with spoken words. Yet the majority adheres to the former judgment of this court on the ground that defendant's utterances are fighting words which are punishable as a criminal act.

As noted in *Gooding* v. *Wilson* (1972), 405 U. S. 518, 523, the decisions of the United States Supreme Court "since *Chaplinsky* [*Chaplinsky* v. *New Hampshire* (1942), 315 U. S. 568] have continued to recognize state power constitutionally to punish 'fighting' words under carefully drawn statutes not also susceptible of application to protected expression • • •."

In my opinion, Cincinnati Ordinance 901-d4 is not a "carefully drawn" proscription of unprotected speech and is "susceptible of application to protected expression." Therefore, it is "constitutionally overbroad and • • • is facially invalid." *Lewis* v. *New Orleans* (1974), U.S. , 39 L. Ed. 2d 214, 220.

W. BROWN, J., concurs in the foregoing dissenting opinion.

STERN, J., dissenting in part. Although I agree with the first two paragraphs of the syllabus in this case, I am constrained to dissent from the majority's judgment because I believe that appellant is entitled to a new trial.

What Justice Herbert has ably accomplished by his opinion is to limit the application of Cincinnati Ordinance 901-d4 to speech not protected by the United States Constitution. This was necessary because the ordinance was overly broad, and therefore susceptible of being struck down as facially unconstitutional.

Appellant was, however, convicted of violating the constitutionally suspect Ordinance 901-d4. In my view, that fact entitles him to have the criminality of his language specifically determined under the standards announced by the majority, and by a panel of jurors in whom we should repose the initial responsibility for judging the "fighting" nature of appellant's words.[2]

---

[2] The "harmless error" standard of *Chapman* v. *California* (1967), 386 U. S. 18, has no application where the error complained of goes to the essential nature of the crime charged.

Supreme Court, U. S.
FILED
JAN 5 1977
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1976
No. 76-691

DANIEL THOMPSON,
Petitioner,

vs.

EDWARD GAFFNEY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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Supreme Court of the United States

October Term, 1976
No. 76-691

DANIEL THOMPSON,
Petitioner,

vs.

EDWARD GAFFNEY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

In addition to the questions submitted by the petitioner, the following question is submitted:

Where a petitioner, on direct appeal from a state criminal misdemeanor conviction has knowingly failed to petition this Court for a writ of *certiorari* and immediately thereafter commences a collateral *habeas corpus* attack in the federal courts, should this Court, considering the "substantial societal costs" of collateral attacks, allow a writ of *certiorari* to issue for the review of the same issues that could have been presented to this Court originally.

(While respondents object to the phrasing of the questions presented by the petitioner, and to several substantial incorrect factual statements contained therein, they feel that questions generally state the issues that this Honorable Court would be reviewing if it allowed the petitioner his writ of *certiorari*.)

STATEMENT OF THE CASE

On February 25, 1972 Daniel Thompson, the petitioner, was convicted by a jury of the Cleveland Heights Municipal Court of violating the municipality's disorderly conduct ordinance. (No verbatim record was taken at the trial, but a Statement of the Evidence was filed by the trial court (Petitioner's Appendix G, pp. 28a-31a), the contents of which are not disputed by counsel for the petitioner.)

On June 7, 1973, the Court of Appeals of Ohio (Eighth District), affirmed the verdict of the jury and the judgment of the trial court.

After the Court of Appeals denied Mr. Thompson's motion for reconsideration, he filed an appeal of right and a motion to certify the record with the Supreme Court of Ohio. On October 12, 1973, the Court dismissed his appeal and overruled the motion to certify. A request for a rehearing was denied by the state high court on November 8th.

The petitioner applied for, and received, from the United States Supreme Court a stay of execution of sentence pending the disposition of a petition for a writ of *certiorari*. However, no petition was filed within the jurisdictional period and on February 8, 1974, Associate Justice Potter Stewart vacated the stay of execution.

On February 15, 1974 the petitioner filed in the United States District Court for the Northern District of Ohio, Eastern Division, a petition seeking a writ of *habeas corpus*.

On February 22, 1974 the respondents filed a motion to dismiss the complaint.

On May 6, 1975 the District Court issued a Memorandum Opinion & Order denying the writ and dismissing the petition. The Court entered judgment accordingly.

A notice of appeal was filed on May 7, 1975.

On June 6, 1975 the District Court certified the existence of probable cause for an appeal.

On August 13, 1976, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court.

A petition for rehearing was denied on October 8, 1976.

The instant petition for a writ of *certiorari* was filed on November 17, 1976.

At p. 7 of the petitioner's Statement of the Case, petitioner's counsel, in an apparent attempt to pique the interest of this Court makes certain statements with respect to "local practice" and the indigency of his client at the time of trial.

This is the first time that the petitioner has attempted to raise an issue either directly, or indirectly with respect to the fact that no verbatim record was made of the trial proceedings.

At the time of his trial, the petitioner was represented by two retained attorneys of his own selection.

At no time did either the petitioner, or his counsel, raise the issue of indigency with the trial court, and at no

time was a court reporter requested by the petitioner or any member of his defense team.

If the petitioner was indigent at the time of his trial, it was an undisclosed and private indigency, because the Court was never advised of it.

The procedure filed by the trial court with respect to the providing of a court reporter was in full accord with the then existing law of the State of Ohio.

Respondents respectfully object to the emphasis (underlining) supplied by the petitioner to portions of certain lower court entries, without noting that the emphasis was his, and not that of the issuing court.

REASONS FOR DENYING THE WRIT

Rule 19(1) of the Rules of the Supreme Court provides that a review on writ of *certiorari* will be granted only where there are "special and important reasons" for so doing.

Counsel for the respondents respectfully submits that there are two principal reasons why a writ of *certiorari* should not issue in the instant action.

The first relates to the basis of the judgment entered by the United States Court of Appeals for the Sixth Circuit on August 13, 1976 (petition for rehearing denied October 8, 1976); the second to the law applied by that court in affirming the finding of the United States District Court that the decision of the Supreme Court of Ohio in the case of *Cincinnati v. Karlan*, 39 Ohio St. 2d 107, 314 N.E.2d 162 (1974), provided an authoritative, constitutionally limited construction of the "almost identical" ordinance of the City of Cleveland Heights, the plaintiff in the

criminal misdemeanor prosecution that was commenced in 1971.

The decision of the Court of Appeals was based not so much upon the merit or lack of merit of the errors assigned by the appellant-petitioner, but upon the fact that his counsel, who has represented him throughout these proceedings, failed to provide to it a record demonstrating the existence of said errors.

At p. 5 of its opinion the Court stated:

> "Finally, Thompson claims that the municipal judge failed to instruct the jury that it could convict only for constitutional 'fighting words.' If we had before us a transcript demonstrating that the jury was not so instructed, we would hold that the writ should have been granted because of the possibility that the jury convicted Thompson for protected speech. However, in the absence of a transcript of the court's instructions to the jury, and according to the state proceedings the presumption of regularity to which they are entitled, we have no alternative but to hold that Thompson has failed in carrying his burden of proving that the jury was not properly instructed.
>
> The responsibility of placing the charge before us was that of the appellant, and it would seem improper to place the onus of his not having done so on the appellees in this habeas corpus proceeding which attacks a judgment of conviction arising from a trial which was held more than four and one-half years ago." (Citations omitted) (Petitioner's Appendix C, pp. 9a-10a)

It should be noted that even the dissent of Circuit Judge McCree is not based upon the merits of Mr. Thompson's appeal, but upon that judge's belief that the

"presumption of regularity" given to the state court proceedings by the majority of the panel was not proper.

Judge McCree would have required the appellees-respondents to establish in the District Court the precise jury instructions given by the trial court, and to demonstrate that the instructions complied with law. (As noted by the trial court in its Statement of the Evidence (Petitioner's Appendix G, p. 28a) no court reporter had been requested and therefore no verbatim record was made of the trial proceedings. At no time has the petitioner claimed that his right to object to, or to request expansion of the trial court's statement as provided by Ohio law was ever exercised by his counsel. In actual fact, the statement filed by the trial court was originally drafted by petitioner's counsel, as provided by Ohio law, and was signed by the Court without the making, in respondents' opinion, of any fundamental changes.)

Respondents respectfully submit that if this Honorable Court were to grant the writ of *certiorari* sought by the petitioner, it would be supplied with a record no more complete than the one that the Court of Appeals had before it when it affirmed the judgment of the District Court, and that the same deficiencies that confronted the appellate court would also become apparent to this Court.

In claiming error by the Court of Appeals, the petitioner, for the first time, argues the applicability of 28 U.S.C. §2254(d) (Petitioner's Appendix I, pp. 34a-36a.) It is submitted that this subsection has no applicability to judgment rendered by the Court of Appeals.

At p. 24 of his brief, petitioner states that the District Court declared Section 931.01(a) of the Codified Ordinances to be "constitutionally deficient". From a reading of the citation provided (Petitioner's Appendix D, p. 17a)

it would appear that the petitioner has greatly embellished the statement (*dicta*) actually made by the court.

It is respectfully submitted that neither the record below, nor the holdings of cases cited by the petitioner support his argument that the appellate court erred in applying the "presumption of regularity" principle to the appeal that it heard.

As to the second reason for denying the writ of *certiorari* to the petitioner, the authoritative construction issue, the respondents can present this Court with no better argument than to submit the written opinion of the Court of Appeals. (Petitioner's Appendix C, pp. 7a-9a.)

The Court of Appeals held that although the narrowing construction contained in the case of *Cincinnati v. Karlan*, 39 Ohio St. 2d 107, 314 N.E.2d 162 (1974), had come three years after the petitioner's "verbal onslaught", the District Court was not precluded from finding that the construction had cured the overbreadth of the ordinance, and that it was not necessary for the Supreme Court of Ohio to construe the Cleveland Heights enactment where the District Court found it to be "substantially identical" with the ordinance at issue in the *Karlan* case.

The Court of Appeals also found other Ohio appellate decisions: *Columbus v. Schwarzwalder*, 39 Ohio St. 2d 61, 313 N.E.2d 798 (1974), and *Kent v. Kelley*, 44 Ohio St. 2d 43, 337 N.E.2d 788 (1975), to have construed other "similar" disorderly conduct ordinances.

The reasoning of the trial judge in the case of *Pritkin v. Thurman*, 311 F. Supp. 1400 (U.S.D.C., S.D. Fla., 1970), first cited by the appellate court in its opinion, is applicable to the facts of this case.

It is submitted that the paucity of cases on point is an indication of general acceptance by lawyers and courts of the fundamental nature of the proposition.

Before concluding, respondents' counsel would submit to this Honorable Court an additional reason why he believes that a writ of *certiorari* should not be issued in the instant case.

It is based upon the apparent reasoning of the Court in the case of *Stone v. Powell*, ... U.S. ....., 49 L. Ed. 2d 1067 (July 6, 1976).

In *Stone*, the Court took note of the "substantial societal costs" that must be paid when a state court criminal conviction is sought to be overturned on a collateral *habeas corpus* review in the federal courts. (The Court's attention is respectfully directed to footnote #31 in the *Stone* case.)

The *Stone* case dealt with the Fourth Amendment and the "exclusionary rule". The instant appeal relates to the First Amendment and the extent of petitioner's "freedom of speech".

Respondents recognize that *Stone* is not directly applicable to the petitioner's case, and that the federal court's *habeas corpus* jurisdiction in First Amendment cases should be as broad as is necessary in order to assure that innocent persons are not unconditionally incarcerated for utterances that are constitutionally protected.

And respondents are not arguing that the federal courts should cease to exercise *habeas corpus* jurisdiction with respect to reviewing state and municipal "disorderly conduct" and "disturbing the peace" enactments.

But where a criminal defendant has litigated an issue in the state courts, has exhausted his state court remedies

and then knowingly fails to exercise his right to petition for the issuance of a writ of *certiorari* by this Court, society should not have to pay the costs, as it has done so far in this case, of having the defendant launch a collateral attack, *via* the *habeas corpus* route, in the federal courts, and then to again seek a review by this Honorable Court of the very same issues that he could and should have timely presented upon direct review.

In the instant case the petitioner, on direct appeal, requested and received from the Supreme Court of Ohio a stay of execution of sentence, in order that he might file a petition for writ of *certiorari* with this Court.

Upon motion by the petitioner, and without objection by the City of Cleveland Heights, Associate Justice Potter Stewart continued the stay order until such time as the Court had ruled upon the petition that the petitioner stated that he was going to file.

But no petition for a writ of *certiorari* was filed and on February 8, 1974 Justice Stewart vacated his stay order (Respondent's Appendix, at p. 11.)

On February 8, 1974, the petitioner filed in the United States District Court for writ of *habeas corpus*.

Both the District Court, and the Court of Appeals have denied the petitioner's petition.

Given the history of this action there is no reason that society must continue to bear the costs of the petitioner's collateral attack. It is respectfully argued that the petitioner has had his day in court and that his constitutional rights have been fully protected.

CONCLUSION

It is respectfully argued that the petitioner has failed to demonstrate the existence of the special and important reasons that are necessary to secure a writ of *certiorari* from this Honorable Court, and that based upon the foregoing, the petition should be denied.

Respectfully submitted,

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APPENDIX

ORDER OF THE UNITED STATES SUPREME COURT VACATING STAY OF EXECUTION

(Dated February 8, 1974)

No. A-506

SUPREME COURT OF THE UNITED STATES

DANIEL THOMPSON,
Petitioner,
v.
CITY OF CLEVELAND HEIGHTS.

ORDER

A PETITION for writ of certiorari not having been timely filed in the above-entitled cause,

IT IS ORDERED that my order of December 11, 1973 (which continued the stay of execution of sentence granted by the Supreme Court of Ohio in case No. 73-771) be, and the same is hereby, vacated.

/s/ POTTER STEWART
Associate Justice of the Supreme Court of the United States.